IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12646 of 2000

For Approval and Signature:
***HONOURABLE* MS. JUSTICE R.M.DOSHIT**

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?
1 & 2 : YES
3 to 5 : NO

==========

BOARD TRUSTEES OF THE PORT OF KANDLA - Petitioner(s)

Versus

TARIFF AUTHORITY OF MAJOR PORTS & 2 - Respondent(s)

==========

Appearance :
MR SN SHELAT Sr Advocate with
Mr. ALPESH RAJPURIYA for Petitioner
MR PARESH M DAVE for Respondent(s) : 1,
MR DC DAVE for Respondent(s) : 2,
MS NALINI S LODHA for Respondent(s) : 3,

==========

CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 11/07/2007

ORAL JUDGMENT

The present petition under *Article* 226 of the Constitution of India is preferred by the Board of

Trustees of Port of Kandla [hereinafter referred to as, "***the Board***"] against the Order dated 26th September, 2000 made by the Tariff Authority for Major Ports [hereinafter referred to as, "***the Tariff Authority***"] and the consequent Notification issued on 6th October, 2000.

The dispute in this petition revolves around the question whether the Kandla Port Trust [hereinafter referred to as, "***the Port Trust***"] had authority to claim demurrage for uncleared cargo in accordance with the Resolution passed by the Board on 9th January, 1997. The facts are such that in April, 1999 the respondent no.2 [hereinafter referred to as, "***the exporter***"] brought certain quantity of cargo [boiled rice] in transit area of the Port Trust for export to Bangladesh. *Admittedly*, the cargo was not cleared within the specified period, nor the said cargo was exported. Part of the cargo was allowed to be cleared by the exporter. The remainder of the cargo was auctioned away by the Port Trust. The sale proceeds were retained against the amount of demmurage chargeable at the rates prevalent. Admittedly, the exporter has not been allowed rebate

as was prevalent prior to 9th January, 1997. According to the policy prevalent prior to 9th January, 1997, under Scale "E" - Schedule of Demurrage Charges, the cargo brought in the transit area was allowed a free period of fifteen days; extendable upto *thirty* days, in the circumstances mentioned in the said Schedule. For overstay of the cargo, demurrage was chargeable at the rate prescribed. Under schedule of rates, the Note No.1 read as, "***A rebate of 50% shall be allowed on the rates for export cargo***". On 9th January, 1997, the Board passed Resolution No.71 and resolved to approve interpretation of the provisions in the Scale of Rates in respect of demurrage charges mentioned therein and to implement the same from 9th January, 1997. The relevant Resolution read that, "***the rebate of 50% in demurrage rates shall be allowed only on cargoes physically exported but not otherwise.***" It is this resolution which is in the eye of storm in the present litigation.

According to the Port Trust, the said resolution was a mere clarification of the then existing rules regarding demurrage charges. While according to the exporter the said resolution was an

amendment to the existing rules for demurrage charges and could not have been made effective until the sanction was accorded by the Central Government and the Notification was published in the Official Gazette. It is also argued that the authority to prescribe demurrage charges was conferred upon the Board by Section 52 of the Major Port Trusts Act, 1963 [hereinafter referred to as, "***the Act***"]. The said Section 52 has been omitted from the Act by Ordinance No. 1 of 1997 on and from 9th January, 1997. Thus, on 9th January, 1997, the Board was divested of its power to prescribe rates of demurrage or to prescribe conditions in which case the demurrage can be charged. By the said Ordinance, the power to fix, *inter alia*, the demurrage charges and the circumstances in which the same can be charged has been vested in the Authority. Hence, the action of the Port Trust in not allowing fifty *per cent* rebate to the exporter was without the authority of law and *ultra vires* the Act. It is also the case of the exporter that by amendment brought about in the act by Ordinance no.1 of 1997, the Government of India was enjoined to constitute an authority known as the

Tariff Authority for Major Ports. Under Section 48 of the Act, the Tariff Authority is empowered to prescribe the tariff in various areas mentioned in Clauses (a) to (e) thereof; including the demurrage. The exporter, therefore, had a right to approach the Authority in the subject matter and to get it clarified whether the exporter was entitled to fifty *per cent* rebate in the demurrage charges as it prevailed prior to 9th January, 1997. It was in exercise of the said power that the Authority made the *impugned* order and issued the *impugned* Notification. The Authority was within its right to declare the action of the Port Trust in not allowing the rebate in respect of the cargo brought by the exporter was unjustified.

Mr. Shelat has assailed the *impugned* Order made by the Authority. His submissions are mainly two fold. He has submitted that Section 48 of the Act empowers the Authority to frame the scales of rates at which and a statement of conditions under which, any of the services specified therein shall be performed by the Board. The services covered by Clause [d] are, ***"wharfage, storage or demurrage of***

goods on any such place". Thus, it has the power to frame the scale of rates which has been conferred upon the Authority by the Act. But the Act does not empower the Authority to enforce such scale of rates or to decide upon any *lis* between the Port and the Port user. He has next submitted that even if such power were vested or assumed, the Authority could not have acted in the present matter in as much as it would amount to retrospective operation. He has relied upon Section 48 and Section 29 (3) of the Act.

Mr. Dave has vehemently argued that as the Board was divested of its power to prescribe the scale of rates on and from 9th January, 1997, the Board could not have passed the resolution by which the right of the exporter to claim fifty *per cent* rebate in the demurrage charges was abrogated. He has next submitted that even if the Board were authorized to pass the said resolution, it would not become effective until it was accorded sanction by the Central Government as envisaged by then prevailing Section 52 of the Act. He has next submitted that the present Section 48 of the Act was introduced on 9th January, 1997 and Section 52 of the Act was omitted

from that date. On and from 9th January, 1997, the Board could not have altered the scale of rates or the circumstances in which the same shall apply. The Port Trust was, therefore, under an obligation to continue to operate the scale of rates and the circumstances in which such scale of rate would apply as were prevalent on 8th January, 1997 till the Authority became functional. He has further submitted that as the Authority is empowered to frame the scale of rates and the conditions under which they shall apply, the power to enforce such rates is inherent to the Authority. What the Authority did by the *impugned* Order was to give a declaration that the action of the Port Trust in not allowing the rebate in respect of uncleared cargo brought in by the exporter was unjustified and that the exporter was entitled to a rebate under the rules prevalent on 8th January, 1997.

Miss Lodha has appeared for the respondent no.3-Bank of Baroda [hereinafter referred to as, "***the Bank***"]. She has supported respondent no.2. She has submitted that the Bank had advanced loan/credit facility to the exporter to the extent of Rs. 6.75 Crores against the security by way of hypothecation

of the export cargo i.e., 10,000 MT of Non Basmati par-boiled rice. As the Bank could not recover the said amount, it had approached the Debt Recovery Tribunal at Calcutta. The said Tribunal in its Order specifically declared that the Bank was entitled to recover the sale proceeds of Rs. 3,30,84,376/= on payment of demurrage charges. She has submitted that it is the Bank which is entitled to recover the sale proceeds of the cargo on payment of the demurrage to the Port Trust. The Bank is, therefore, vitally interested in ensuring that the Port Trust allows fifty *per cent* rebate in accordance with its then existing policy. She has also raised various contentions why the Port Trust should not be allowed to charge any demmurage and that the entire amount of sale proceeds should be made over to the Bank.

Chapter-VI of the Act is in respect of Imposition & Recovery of Rates at Ports. Sub-section (1) of Section 48 of the Act as was prevalent prior to 9th January, 1997 enjoined the Board, *inter alia*, to frame a scale of rates at which, and a statement of conditions under which, any of the services specified thereunder shall be performed by itself or

any person authorized under Section 42. Clause [d] thereof provided for ***"wharfage, storage or demurrage of goods on any such place."*** Section 52 provided for prior sanction of the Central Government to rates and conditions which read as under :-

> ***"52. Prior sanction of Central Government to rates and conditions -***
>
> ***Every scale of rates and every statement of conditions framed by a Board under the forgoing provisions of this Chapter shall be submitted to the Central Government for sanction and shall have effect when so sanctioned and published by the Board in the Official Gazette."***

The President's Ordinance No.1 of 1997 was promulgated on 9th January, 1997. It was called as, ***"The Port Laws [Amendment] Ordinance, 1997"***. Under Chapter-III of the said Ordinance, amendments were made to the Act. The ones which are relevant for our purpose are; the omission of Section 52 of the Act, Constitution of the Authority under Section 47-A of the Act, powers of the Authority under Section 48 of the Act and vesting of such powers under sub-section (3) of Section 29 of the Act.

Under amended Section 48 of the Act, the duty to frame a scale of rates at which, and a statement of conditions under which, any of the specified

services thereunder shall be performed, inter alia, by the Board, has been enjoined upon the Authority. By omission of section 52 of the Act, the Board has been divested of such powers. Although the Ordinance does not make transitory provision, sub-section (3) of Section 29 of the Act provides that, ***"Notwithstanding anything contained in clause (a) of sub-section (1), the right to fix rates vested in the Board shall vest in the Authority as from the date it is constituted under sub-section (1) of Section 47-A."***

Three questions that arise for my consideration are :- {i} Whether the Authority has power to decide a *lis* between Port and its user; {ii} Whether the powers vested in the Authority are retrospective in nature, and {iii} whether the aforesaid Resolution No. 71 was a mere clarification as submitted by the Board and that it could have effectively been enforced without seeking prior sanction of the Central Government as envisaged by then existing Section 52 of the Act.

*S*ection 48 of the Act as is prevalent since 9th January, 1997 reads as under :-

"48. Scales of rates for services performed by Board or other person -

[1] The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorized under Section 42 at or in relation to the port or port approaches-

(a) transhipping of passengers or goods between vessels in the port or port approaches;
(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession of occupation of the Board or at any place within the limits of the port or port approaches;
(c) cranage or porterage or goods on any such place;
(d) wharfage, storage or demur rage of goods on any such place;
(e) any other service in respect of vessels, passengers or goods,

[2] Different scales and conditions may be framed for different classes of goods and vessels."

It is apparent that the above Section empowers the Authority to frame scale of rates at which, and a statement of conditions under which, any of the services specified thereunder shall be performed by a Board. The said Section does not, by express or

implied provision, confer a right upon the Authority to entertain and decide a *lis* between the Port and the port user. The above referred sub-section (3) of Section 29 of the Act expressly provides that such powers shall vest in the Authority from the date it is constituted. *Indisputably*, the Authority was not constituted on 9th January, 1997 but some day on a later date. In no circumstances, the Authority could have exercised its power retrospectively from any date before it was constituted. Certainly the exporter had no remedy before the Authority.

I am, therefore, of the opinion that the impugned order dated 26th September, 2000 was made by the Authority wholly without the authority of law. So was the consequent Notification dated 6th October, 2000.

In above view of the matter, the *impugned* order dated 26th September, 2000 and the Notification dated 6th October, 2000 deserve to be *quashed* and set aside.The petition is accordingly allowed. The *impugned* order dated 26th September, 2000 made by the respondent no.1-Tariff Authority for Major Ports and the consequent Notification dated 6th October, 2000

are quashed and set-aside. Rule is made absolute. The parties will bear their own cost.

It is evident that the exporter and the respondent no. 3-Bank, if have any claim or dispute in respect of the cargo in question auctioned away by the Port Trust or the sale proceeds thereof or demurrage charges collected by the Port Trust shall have to take recourse to ordinary civil remedy or any other remedy available under the law. In case the said respondents resort to any such remedy, the concerned Court shall have to consider and answer the questions raised in such proceeding. I, therefore, do not deal with the other issues raised in the present petition. It is clarified that both the respondents no. 2 & 3 shall be at liberty to avail of such remedy as may be available.

{Ms. R.M Doshit, J.}

*Prakash**